SUPREME COURT, U. S.
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Supreme Court Of The United States

October Term, 1973
No. 74-1

JOHN A. CARDIN - - - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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Supreme Court Of The United States

October Term, 1973
No.

JOHN A. CARDIN *Petitioner*

versus

COMMONWEALTH OF KENTUCKY *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, John A. Cardin, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky affirming the conviction of the Petitioner in the Hardin Circuit Court at Elizabethtown, Kentucky.

OPINIONS BELOW

The Trial Court rendered no written opinion in this case. The opinion of the Court of Appeals of Kentucky was a memorandum opinion, not to be cited as authority, which will not be reported. It is printed in the Appendix to this petition at pages 1a-2a. The mandate of the Court of Appeals of Kentucky denying the Petitioner's motion for rehearing appears in the Appendix at page 3a.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on February 15, 1974. A timely petition for rehearing was denied on April 26, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Whether The Petitioner Was Denied His Fourteenth Amendment Right Of Due Process of Law Because He Was Convicted Of A Crime In The Absence Of Evidence Proving One Of The Essential Elements Of The Offense?

II. Whether The Petitioner Was Denied His Fourteenth Amendment Right Of Due Process Of Law Where The Trial Judge Failed To Give Instructions Limiting The Purpose For Which Evidence Of Other Crimes Should Be Used?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, John A. Cardin, resides on a farm on the edge of Sonora, Kentucky, in Hardin County. In addition to owning and operating three farms and conducting a crop spraying business, he is the owner and operator of the Sonora Garage. As a result of an investigation of stolen property conducted by Detective Richard McQuown of the Kentucky State Police, the Hardin County Grand Jury returned an indictment in January, 1971 against the Petitioner, charging him with seven counts of knowingly receiving stolen property and one count of arson.

Detective McQuown's investigation was centered primarily on four days, the 10th, 11th, 12th and 14th of December, 1970. On Thursday, December 10, 1970, the detective, in connection with other investigations, traveled to the Sonora area and while there obtained a search warrant for a barn located on the Cardin residence (referred to at trial as farm number one). The barn was later determined at trial to have been leased at that time to an individual known as Edward T. Jarrett. At about 7 o'clock in the evening, McQuown drove to the Cardin farm where he searched the barn and discovered tobacco identified as belonging to Albert Parsley of Edmondson County, Kentucky. The Petitioner was summoned to the barn, and according to McQuown's testimony, stated that the tobacco did not belong to him. No arrest was made at that time.

McQuown testified that the following day, December the 11th, at about 8 o'clock in the morning, he went to Edlin's Machine Shop in Elizabethtown, Kentucky, after receiving a telephone call. On arriving there he

found a 1970 Chevrolet truck without a bed. He identified the truck as being an E-Z Haul rental truck belonging to National Car Rental. In examining the cab of the truck, the detective found a packet containing a lease agreement which had been executed between the owner and an individual named James H. Steele. McQuown then drove to a local airport and obtained a pilot to fly him over the Cardin farms.

While conducting his aerial surveillance, he sighted a portion of the body of a 1965 Chevrolet truck and a portion of the bed of the 1970 Chevrolet truck found that morning at Edlin's Machine Shop. The truck, owned by Alton Miller of the Yellow Cab U-Drive-It Company in Bowling Green, Kentucky, was found on the second farm in the midst of junked vehicles. The bed was discovered on the third farm. The truck and bed were then removed to the Irwin and Miller Garage.

On December the 12th, McQuown went to the Cardin residence after receiving a call from a person who he refused to identify at the trial. He testified that when he arrived he found that a fire was in progress. On investigating the fire, he discovered that a portion of the truck bed belonging to the previously discovered 1965 Chevrolet truck was burning.

During the trial Detective McQuown testified that after recognizing the truck bed he placed Mr. Cardin under arrest and advised him of his rights. According to McQuown, he and the Petitioner then engaged in a lengthy private conversation concerning the stolen property which had been discovered. He related during his testimony at trial that Cardin admitted knowing that the trucks and tobacco were stolen. In addition, he

testified that the Petitioner informed him that there were a number of stolen cattle grazing in a nearby field and additional stolen tobacco in a warehouse in Greensburg, Kentucky, and that Mr. Cardin promised to take him to the other tobacco on the following Monday. Following the conversation with Cardin, McQuown took him to a State Police Post where the Petitioner was fingerprinted, photographed and otherwise processed. He was then released.

During the trial, the Petitioner also testified as to what occurred at his residence on December 12, 1970. He stated that during the conversation with McQuown he never admitted having any knowledge of the stolen nature of the trucks, tobacco or cattle. He did agree, however, that he promised to take the detective to Greensburg and in fact on Monday they did travel to the warehouse located there. However, he explained that the tobacco in Greensburg had been moved by him from the barn leased to Edward T. Jarrett at Mr. Jarrett's phone request. He further stated that he had no idea that the tobacco was stolen until McQuown searched the barn on December the 10th and found Mr. Parsley's tobacco. In order to have time to locate Jarrett and ascertain from him what was going on, he asked the detective to put off going to Greensburg until Monday.

Mr. Cardin also testified that the 1970 truck found at Edlin's Machine Shop was driven there by him for the purpose of having the bed lengthened for a customer known to him as James Steele. Mr. Steele had been trading with Mr. Cardin for a number of months, and according to the Petitioner, would go to his stock of junked vehicles on one of the Cardin farms and himself

remove the parts that he wished to purchase. While the Petitioner never stated that Mr. Steele may have had anything to do with the 1965 Chevrolet truck belonging to Alton Miller, he did point out that his fence was reported to him as being down on the farm where the junked vehicles were kept. And, on going to the site, he found mud on the fence and tire marks leading in the direction of those vehicles.

Finally, Mr. Cardin admitted that on his way to work one morning he noticed strange cattle in one of his fields. However, he testified that he just assumed that they belonged to a neighboring farmer. As that farmer stated at trial, it was not unusual for his cattle to break through the fence and wander onto the Cardin farm.

Although Detective McQuown discovered the trucks, tobacco and cattle during his four-day investigation, he did not prefer charges against the Petitioner during that time. A warrant was not issued for Mr. Cardin's arrest until some time after December 14, 1970.

The Petitioner, at a formal arraignment on January 15, 1971 in the Hardin Circuit Court, entered pleas of not guilty to all of the charges in the indictment. Following a motion by defense counsel requesting that the offenses be tried separately and an order by the trial court that the Commonwealth of Kentucky designate which of the offenses it would elect to try, the Commonwealth elected to try the Petitioner on counts 1, 2, 3 and 4 of the indictment, namely four counts of knowingly receiving stolen property. Subsequently, the Petitioner was tried on the charges of knowingly receiving the following stolen property: a 1965 Chevrolet truck; a 1970 Chevrolet truck; 24 head of Holstein cattle; and tobacco belonging to an individual named

Albert Parsley. The trial began on June 26, 1972, and continued for four days. The jury returned a verdict finding the Petitioner guilty on all four counts and fixed his punishment at one year for each count. A motion for a new trial and judgment notwithstanding the verdict was timely filed, detailing the grounds upon which the court should have set aside the verdict. After a hearing, the court overruled the motion and on April 18, 1973, sentenced the Petitioner to serve a period of one year on each of the four counts of the indictment, the sentences to be served consecutively in the state penitentiary. The state appeal followed.

The case was conducted at the trial level by J. T. Hatcher, Elizabethtown, Kentucky, attorney for Petitioner, and by Hobson L. James, Elizabethtown, Kentucky, attorney for the Commonwealth of Kentucky.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION OF WHETHER THE CONVICTION OF A CRIMINAL DEFENDANT IN THE ABSENCE OF EVIDENCE PROVING ONE OF THE ESSENTIAL ELEMENTS OF A CRIME IS A VIOLATION OF DUE PROCESS OF LAW, THE RESOLUTION OF WHICH IS IN CONFLICT AMONG THE VARIOUS FEDERAL AND STATE JURISDICTIONS.

The Petitioner was convicted at trial on four counts of knowingly receiving stolen property, including a 1970 Chevrolet truck, in violation of KRS 433.290.[1] Following the close of the case for the Commonwealth of Kentucky, defense counsel moved for a directed verdict, stating as his grounds that the prosecution had failed to prove all of the essential elements of the offenses being tried (Appendix 46a-47a). The trial judge overruled the motion. After completing the case for the defense, Petitioner's counsel renewed his motion for a directed verdict and, again, the trial court overruled it (Appendix 49a). On appeal, both in his brief and petition for rehearing, Petitioner urged the Kentucky Court of Appeals to reverse his conviction as to the 1970 truck and direct that a verdict of acquittal be entered on that count of the indictment. He argued that the Com-

[1] KRS 433.290 [1199] Receiving stolen property.
Any person who receives any stolen property, the stealing of which is punishable as a crime, knowing it to be stolen shall be liable to the same punishment as the person stealing it. Any person who violates this section may be convicted, although the principal offender has not been convicted. The possession by any person of any stolen property shall be prima facie evidence of his guilt under this section.

monwealth had failed to prove that the truck had been stolen. However, the Court of Appeals affirmed the conviction, stating in its memorandum opinion that the Court felt that the evidence presented at trial that the 1970 Chevrolet truck had been altered was sufficient proof of the truck having been stolen (Appendix 1a-2a). Petitioner feels that such a conclusion is erroneous

It is the law in Kentucky that the Commonwealth must adequately prove that goods are stolen if it is to be found in compliance with proving the essential elements of knowingly receiving stolen property. *Grider* v. *Commonwealth,* Ky., 479 S.W. 2d 11 (1972). And, in *Ellison* v. *Commonwealth,* 190 Ky. 305, 227 S.W. 458 (1921), the Court of Appeals, in reciting the elements of that offense, defined stolen property as property which has been the subject of a larceny:

> "To constitute the crime of knowingly receiving stolen property, under section 1199, Ky. Stats., the property received must theretofore have been the *subject of a larceny* perpetrated by one, other than the party accused of having feloniously received it; the reception must have been with knowledge of the recipient that the property had been stolen; and the reception must have been accompanied with the intention to deprive the owner of it." (Emphasis added.)

However, the Commonwealth, in the instant case, failed to prove that a larceny had occurred as to the 1970 truck and, at most, presented only evidence as to an unlawful conversion. As noted in *Clark* v. *Commonwealth,* Ky., 386 S.W. 2d 458 (1965), "larceny" and "conversion" are distinct offenses.

The Court of Appeals in *Rice* v. *Commonwealth*, Ky., 300 S.W. 2d 238 (1957), a case cited often in Kentucky for its definition of larceny, stated:

> "Generally speaking, and in the absence of statutory modifications, it is essential to every larceny that there be a simultaneous combination of an unlawful taking, and asportation, and a felonious intent. See 32 Am. Jur., Larceny, Section 10; Roberson's Ky. Cr. Law, Sections 806 and 807. Furthermore, this Court has held that if the owner of property (or his agent) is induced to part with the mere possession of his property by trick or fraud, the taker at the time having an intention to wrongfully appropriate the property to his own use, the taking by such means is larceny. Hudspeth v. Commonwealth, 195 Ky. 4, 241 S.W. 71; Trotter v. Commonwealth, 169 Ky. 551. 184 S.W. 871. L.R.A. 1916E, 768; Roberson's Ky. Cr. Law, Section 821."

From *Rice*, we learn that generally a larceny requires the simultaneous combination of an unlawful taking and a felonious intent. The evidence as to larceny in the instant case does not fit this definition because there was no unlawful taking. Rather, the testimony of A. O. Bingenheimer, an employee of the owner of the truck, National Car Rental, is absolute on the fact that the truck was properly leased to an individual known as James Steele, and thus Mr. Steele came into possession of it lawfully. Mr. Bingenheimer testified concerning the lease agreement (Exhibit 20) as follows (Appendix 37a-38a):

> Q55 Now, I take it you have no personal knowledge of having rented this truck or leased it out to this man, Steel, do you?

A No, sir.
Q56 All you have to go on is the record which has been filed here, and some testimony which was found in the cab of the truck?
A That is correct.
Q57 And whatever agreement there was between Steel and the car company you work for, all you know about it is what is embodied in that contract, is that right?
A Yes, sir.
Q58 You don't have any knowledge of any agreement or understanding with Steel except what's in that contract?
A None, sir.
Q59 And according to that contract, the truck was leased out on December the 5th, 1970, and is there anything in that contract stating when that truck was to be returned?
A I don't see it in this particular one.
Q60 So if that truck was delivered to Steel on that date pursuant to that agreement, Steel rightfully had possession of it at that time, didn't he?
A That's correct, sir.

Both the fact that the truck was leased to Steele on December 5, 1970, with no return date specified in the agreement and the fact that Detective McQuown discovered the truck on December 11, 1970, indicate that the truck was not stolen. At least such proof, keeping in mind that no evidence was offered that National Car Rental ever reported to the authorities the truck as missing, did not establish that the truck was the subject of a larceny.

The opinion in *Rice*, supra, also noted that an exception to the requirement of proving an unlawful taking

exists in which a larceny may be proved even though the element of unlawful taking is not present. This is a situation, as in the present case, where the person coming into possession of property acquires such property lawfully. However, as the court stated in *Rice*, in order to have a larceny, the owner of the property, or his agent, must be induced to part with possession of the property by trick or fraud, and the taker at the time of receiving the goods must have an intention to wrongfully appropriate the property to his own use. This rule of law was also previously stated, and perhaps worded in a somewhat clearer fashion, in *Fugate* v. *Commonwealth*, 308 Ky. 815, 215 S.W. 2d 1004 (1948):

> ". . . a person who is lawfully in possession of an article cannot be guilty of a larceny unless at the time it was placed in possession the intent to steal was in the mind of the person."

As illustrated by example in Roberson's New Kentucky Criminal Law and Procedure, Section 821 (2d ed. 1927), a person would be guilty of a larceny, where he " . . .obtains possession of a horse with the consent of the owner, by falsely and fraudulently pretending that he wants to use him a short time for a temporary purpose, and will return him at a specified time, when in fact he intends and does wholly deprive the owner of the horse, and appropriates him to his own use . . ."

The Petitioner sincerely believes that for the Kentucky Court of Appeals to have concluded that the Commonwealth proved that the truck was stolen, i.e., the elements of a larceny, it was necessary for the court to determine whether evidence was presented that the lessee of the truck had the felonious intent, at the time

of taking lawful possession, to wrongfully appropriate the property to his own use. We full well realize that ordinarily felonious intent in a case alleging larceny is a question to be determined by the jury. Roberson's New Kentucky Criminal Law and Procedure, Section 842 (2nd ed. 1927). However, there are exceptions to such a rule where the evidence presented goes to the question of intent and shows that no felonious intent to wrongfully appropriate existed at the time of the taking of the property. *Hudspeth* v. *Commonwealth,* 195 Ky. 4, 241 S.W. 71 (1922). The Petitioner submits that the instant case is just such an exception and that the trial court should have directed the jury to find for the defendant on Count No. 2 of the Indictment as the evidence did not support a finding that the lessee of the 1970 truck had the required felonious intent at the time of taking possession of the property.

The Commonwealth introduced evidence via Detective McQuown's testimony that the 1970 truck was altered for the purpose of lengthening the truck so that it might accommodate a long bed. According to McQuown's testimony, the Petitioner had stated to him that a longer bed was taken off the 1965 truck with the intention being that it would be placed on the 1970 truck. McQuown testified that Cardin stated the 1965 truck had been breaking down and a more reliable truck had been needed for hauling the stolen property (Appendix 31a):

Q 149 What vehicle was it?

A They had put that black wooden cattle bed, flat, on the Alton Miller 1965 Chevrolet truck which was in the telephoto

> lens photo, and then they'd removed that bed from it and they were going to take that bed because that truck was breaking down all the time on these trips these fellows in it was involved in; it wasn't good enough for them so they wanted a good truck, and so that's why they were going to put the bed on the 1970 new Chevrolet E-Z-Haul truck, and that's why the frame was being lengthened.

The need for a more reliable truck was the only substantial reason provided by the Commonwealth for the alteration of the truck. That being the case, it was then necessary, in order to prove that the truck was acquired by Steele with a felonious intent to convert the truck at the time of receiving possession, that the Commonwealth present evidence that the 1965 truck was acquired prior to the rental of the 1970 truck.

Mr. Bingenheimer testified that the 1970 truck was leased on December 5, 1970. No evidence was presented at trial as to the exact date that the 1965 truck was stolen nor as to the date that it was leased from Alton Miller. Eugene Miller testified only that it was leased either in November or early December (Appendix 42a). Although an agreement covering the 1965 truck was referred to at trial it was never introduced as an exhibit from which the rental date might have been ascertained. Without presenting evidence that the 1965 truck was acquired prior to the rental of the 1970 truck, the Commonwealth failed in showing that Steele had the felonious intent at the time of taking possession to alter or otherwise convert the truck so that it could be used in place of the 1965 truck. It is just as likely that the inten-

tion to alter the truck developed sometime after he came into possession. Certainly a determination as to when Steele leased the 1965 truck and in turn a determination as to whether the 1970 truck had been acquired after the 1965 truck were not questions of fact to be submitted to the jury. They were matters of law to be proved at the trial by the Commonwealth. However, the Commonwealth never offered the necessary proof. Applying the rule that the felonious intent to appropriate must exist at the time of taking possession where one lawfully comes into possession of property, the Petitioner feels that the Commonwealth failed to prove an essential element of the offense of knowingly receiving stolen property, that being that the 1970 Chevrolet truck was the subject of a larceny.

We ask this Court to consider whether Petitioner's conviction of the offense of knowingly receiving the 1970 Chevrolet truck, absent proof that the truck had been the subject of a larceny, deprived him of the right of due process of law as guaranteed by the Fourteenth Amendment. The Petitioner feels that if the Petition for Writ of Certiorari is granted in this case, this Court would be afforded not only an opportunity to correct the injustice done to Petitioner below, but also to set forth a clear standard in the realm of the fair administration of criminal justice. Such a standard is in dire need of being laid down as is illustrated by the conflicting decisions in various federal and state jurisdictions regarding the question of whether an absence of evidence proving one of the elements of a crime, the crime being made up of several elements, is the same as a conviction on absolutely no evidence so as to violate due process of law

under the rule of *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960) and *Garner* v. *Louisiana*, 368 U.S. 157 (1961).

In the landmark case of *Thompson* v. *City of Louisville*, supra, this Court held that convictions which are devoid of evidentiary support are unconstitutional under the Due Process Clause of the Fourteenth Amendment:

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'conviction upon a charge not made would be sheer denial of due process', so is it a violation of due process to convict and punish a man without evidence of his guilt."[2]

Petitioner realizes, as explained by this Court in *Garner* v. *Louisiana*, supra, a case following the rule of *Thompson*, that the Court will not inquire as to the sufficiency of evidence to support a state conviction, but will only consider the question of whether there is any evidence upon which the conviction might be based. However, Petitioner is not asking that a determination be made as to sufficiency of evidence in his case. Rather, he asks this Court to grant the Petition in order to consider whether the failure of the prosecution to prove the element of a larceny as to the 1970 truck, an essential element of the offense upon which he has been convicted, is a denial of due process of law and falls within the rule of the *Thompson* case.

Various courts have differed as to the interpretation which should be given to *Thompson*, supra. For exam-

[2]See also *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 15 L. Ed. 2d 176, 86 S.Ct. 211 (1965); also, *Adderley* v. *State of Florida*, 385 U.S. 39, 17 L.Ed. 2d 149, 87 S.Ct. 242, reh.den. 385 U.S. 1020, 17 L.Ed. 2d 559, 87 S.Ct. 698 (1966).

ple, the United States Court of Appeals, Fourth Circuit, in *Player* v. *Steiner*, 292 F.2d 1 (CA 4 1961), held that the failure to prove one element of a crime made up of several elements is not such a denial of due process as to bring the case within the rule of *Thompson*. However, in *DeMoss* v. *Pennsylvania*, 316 F.2d 841 (CA 3 1963), the Court of Appeals concluded that some evidence must be found to exist on *all* of the essential elements of an offense, finding that contrary to the notion of the court in *Player*, the rule of *Thompson* and *Garner*, supra, requires such in order to comply with due process of law.

This Court has indicated that for a conviction to comport with the Due Process Clause of the Fourteenth Amendment, evidence must be presented as to all of the essential elements of a crime. In *Harvey* v. *Johnson*, 391 U.S. 596 (1968), an opinion was rendered reversing the decision below, and holding that the prosecution had failed to present evidence as to the essential "ingredient" of "wandering" or "strolling" contained in the criminal statute which the defendant had been charged with violating, although evidence had been provided on the second element of "no lawful purpose or object." And, of even more importance to the Petition before this Court is the opinion in *Harris* v. *United States*, 404 U.S. 1232 (1971). In that recent case, this Court stated:

> "Applicant principally argues that there was no evidence in the record from which an inference is permissible that he knew that a truck guided by him and a co-defendant, in a separate vehicle, from one location in Los Angeles to another location in that city contained unlawfully imported narcotics.

It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process. See Adderley v Florida, 385 US 39, 44, 17 L Ed 2d 149, 154, 87 S Ct 242 (1966). See also Johnson v Florida, 391 US 596, 20 L Ed 2d 838, 88 S Ct 1713 (1968); Thompson v Louisville, 362 US 199, 4 L Ed 2d 654, 80 S Ct 624, 80 ALR2d 1355 (1960)."[3] *(Emphasis added.)*

We, therefore, respectfully ask this Court to grant the Petition for Writ of Certiorari in order to reaffirm the principle of *Harris* v. *United States*, and declare that the Due Process Clause of the Fourteenth Amendment will not tolerate convictions where relevant evidence as to any essential element of an offense charged is absent.

II. THE ADMISSION INTO EVIDENCE OF OTHER CRIMES WITHOUT AN INSTRUCTION TO THE JURY BY THE TRIAL JUDGE LIMITING THE PURPOSE FOR WHICH SUCH ARE INTRODUCED PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION CONCERNING A CRIMINAL DEFENDANT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

At the trial of this case, Detective McQuown, on direct examination, and without being asked by the prosecutor, volunteered to the jury very damaging and prejudicial testimony. This testimony consisted of evidence concerning other offenses, arson and knowingly receiving stolen tobacco belonging to persons other than

[3] See also, *United States* v. *Ramirez*, 482 F.2d 807, 814 (CA2 1973), which held that the defendant's conviction for the violation of 18 U.S.C.A. §924(c)(2) could not stand where the prosecution introduced only evidence that defendant carried a firearm during the commission of a felony and failed to provide proof that he possessed it unlawfully.

Albert Parsley, which the Petitioner had been indicted upon, but which the Commonwealth of Kentucky had elected not to try. The testimony of McQuown was as follows (Appendix 4a-5a):

Q31 Now, Detective McQuown, will you tell us about the cattle?

A I have additional information on the tobacco; I'll cover that and then I'll move on to the cattle.

Q32 All right. Go ahead.

A This was on December the 10th, at 7:00 p.m. when the tobacco was recovered. The investigation centered on three days, primarily, the 10th, 11th, and 12th of December, 1970. On the 12th of December, 1970, I went to the John A. Cardin farm again, to the same house; he owns three farms but this is where his residence is located as well as where the tobacco was located. I went to his farm, and at the time there was a fire in progress behind another barn located beside his house; and he was arrested after a short investigation there, and during the arrest he was advised of his rights; and this was two days later after we recovered the tobacco from the barn. At this time, he admitted to me that the tobacco in the barn—he knew who brought it there, he knew it was stolen, and that it was part of other tobacco that was in the barn also, and that he knew where the tobacco came from.

Following McQuown's testimony as to "arson" and "other tobacco", the court and counsel retired to chambers where defense counsel moved the court to discharge the jury and declare a mistrial because of the prejudicial testimony. As the testimony had been

volunteered and was not a result of specific questions asked by the Commonwealth, defense counsel had no opportunity to object prior to its presentation to the jury. Following discussion, the trial court overruled the motion (Appendix 7a).

Detective McQuown was then called into chambers where he was examined out of the hearing of the jury. Defense counsel, on eliciting testimony from McQuown during this time, discovered that the detective's reference to an arrest in his testimony which was the subject of the mistrial motion was the arrest of the Petitioner for the crime of arson. Counsel for the Petitioner added the evidence of arrest for arson volunteered by McQuown as a ground in his motion. The entire motion for declaring a mistrial was then overruled. However, the trial judge did admonish the witness not to volunteer information but to answer the questions asked by the Commonwealth (Appendix 21a).

On returning to open court, Detective McQuown continued his testimony on direct examination. Once more, in complete defiance to the court's admonition, the witness volunteered to the jury evidence of the arson charge in stating that a truck bed was burning when he arrived at the Petitioner's farm (Appendix 24a):

Q44 Was the bed as it was when it was on the truck?

A No, it had been cut up and partially destroyed, and when I arrived at the farm it was on fire.

Q45 You say the bed was on fire; was that the entire bed?

A The bed consists of the wooden floor and the

> metal frame around it, and then the walls and the roof and the doors and the front portion of the bed had been cut away and they were gone, they weren't even there. The only portion remaining was if it were a flat bed truck that had the walls cut off of it on each side; and it was off of the truck and it was laying on the ground.

Defense counsel then objected to the above testimony concerning the burning of the truck bed as evidence of the arson offense not being tried, and again moved to discharge the jury. And, after doing an about face and holding that the evidence was admissible, the court overruled counsel's motion for the third time.

If Detective McQuown's testimony above did not constitute evidence of other crimes, his later testimony on direct examination certainly did when he related to the jury that after recognizing the burning truck bed he arrested Mr. Cardin (Appendix 27a):

> Q 129 Now, on that occasion and at that place, what occurred? What did you do?
>
> A *Well, after observing the truck bed—John A. Cardin was there with me—I immediately recognized the truck bed, and I placed him under arrest and advised him of his rights.* (Emphasis added)

Although defense counsel had already moved for a mistrial on three other occasions and been overruled, he again renewed his motion for a mistrial following the above testimony by Detective McQuown (Appendix 47a-48a). Once more, the court refused to declare a mistrial and discharge the jury. After all of the objections and motions by defense counsel, the court did not even

relate to the jury that they could only consider the testimony concerning arson and tobacco not belonging to Albert Parsley as indicating such things as intent, motive, guilty knowledge or common scheme or plan on the part of the defendant. And certainly, even if the trial court felt that the evidence of arson was competent as to the charge concerning the 1965 Chevrolet truck, the court was required to at least admonish the jury that they should consider it only for the purpose of showing intent, etc., to knowingly receive that particular truck. The evidence as to arson was in no way competent as to the other three charges being tried.

The Petitioner raised the issue of other crimes on taking an appeal to the Kentucky Court of Appeals and argued the question extensively both in his brief and petition for rehearing. It was his contention that the trial court should have at least admonished the jury the limited purpose for which the evidence as to arson and other tobacco was introduced so as to negate a prejudicial effect as to Petitioner. However, the Court of Appeals in its opinion below failed to mention or even allude to the issue (Appendix 1a-2a), although the law in Kentucky seems to be that the trial court has a duty to give a limiting instruction when evidence of other crimes is introduced.

In referring to evidence of other unlawful receipts of property, the Kentucky Court of Appeals in *Ball* v. *Commonwealth*, 278 Ky. 52, 128 S.W.2d 176 (1939), stated:

> "When such evidence is admitted for the purpose of proving intent, etc., as above pointed out, it becomes the duty of the court to admonish the jury

> the purpose for which all other proven receipts were admitted."

And, in the recent Kentucky case of *Grider* v. *Commonwealth,* Ky., 479 S.W.2d 11 (1972), the Court of Appeals also stated that an admonition by the trial court was required:

> "It is our conclusion that in the next trial evidence of other items in possession of Grider will be admissible, with proper admonition, provided they are adequately shown to have been stolen."

Petitioner does not ask this Court to grant the Petition for the purpose of considering rules of evidence, for he believes that where possible each state jurisdiction should be allowed to promulgate such rules as it sees fit. Rather, he requests consideration of his case in order that this Court be afforded an opportunity to lay down guidelines which will promote the fair and equitable administration of criminal justice by requiring substantive due process which is in compliance with the Fourteenth Amendment. Petitioner sincerely believes that clarification as to the necessity of limiting instructions when other offenses are introduced into evidence is in dire need of being provided in light of conflicting decisions among the various federal and state jurisdictions, and that the Due Process Clause requires that the trial courts of this country make every possible attempt to see that a criminal defendant is convicted as a result of the introduction of relevant evidence as to those crimes upon which he is tried and not because of other crimes introduced for limited purposes.

Numerous federal cases have considered the question of whether a limiting instruction is required and

whether it is necessary that it follow the introduction of other crimes or is sufficient if it comes in the general charge to the jury. In *Montgomery* v. *United States*, 203 F.2d 887 (CA 5 1953), the United States Court of Appeals held that some type of cautionary instruction was required:

> "We think, however, that the jury should have been cautioned that the evidence was admitted only for the light that it might throw on the federal offenses on trial, and that no inference of guilt could be drawn merely from the commission of other offenses different in character. In short, the jury should not convict the defendant of income tax evasion because they concluded that he was a grafter. See Railton v. United States, 5 Cir., 127 F.2d 691; Lurding v. United States, 6 Cir., 179 F.2d 419."

And, the Court of Appeals, District of Columbia, in two recent cases, has also held that limiting instructions are necessary to protect the interests of a defendant when other crimes are introduced. In *United States* v. *Bussey*, 432 F.2d 1330 (CA DC 1970), the Court held that a limiting instruction should have been given at the time of admission of details of a prior offense, while under the facts of *United States* v. *Fench*, 470 F.2d 1234 (CA DC 1972), the Court decided that a cautionary instruction during the general charge to the jury was sufficient.

Finally, the Supreme Court of the United States has on occasion intimated that limiting instructions are necessary. In its opinion in *Williamson* v. *United States*, 207 U.S. 278 (1908), the Court stated:

> "The contention that the proof on the subjects just stated should not have been admitted, because

> it tended to show the commission of crimes other than those charged in the indictment, and consequently must have operated to prejudice the accused, is, we think, without merit, particularly as the trial judge, in his charge to the jury, carefully limited the application of the testimony so as to prevent any improper use thereof."

In *Spencer* v. *Texas*, 385 U.S. 554 (1967), this Court has also indicated that limiting instructions should be given in order to comply with the Due Process Clause of the Fourteenth Amendment so as to negate any prejudicial effect which the introduction of other convictions or crimes might have on a criminal defendant's case.

We, therefore, respectfully ask this Court to grant the Petition for Writ of Certiorari in order to consider the question of whether the Petitioner was deprived of his right to due process of law where evidence as to other offenses was introduced and *no limiting instructions whatsoever* were given to the jury by the trial court.

CONCLUSION

The Petitioner's Fourteenth Amendment right to Due Process of Law was violated when his conviction of Knowingly Receiving a stolen 1970 Chevrolet truck was allowed to stand despite the failure of the prosecution to prove that the truck had been the subject of a larceny. We respectfully submit that the Court should grant the Petition because the decision below presents a substantial Constitutional question of whether the conviction of a criminal defendant in the absence of evidence proving one of the essential elements of a crime is a violation of due process of law, the resolution of which is in conflict

among the various federal and state jurisdictions.

The Petitioner was also denied his constitutional right of due process of law because the trial judge failed to give instructions to the jury limiting the purpose for which evidence of arson and other stolen tobacco should be used. We respectfully submit that the Court should grant the Petition because the admission into evidence of other crimes without an instruction to the jury by the trial judge limiting the purpose for which such were introduced presents a substantial Constitutional question concerning a criminal defendant's Fourteenth Amendment due process right to a fair trial.

Respectfully submitted,

FRANK E. HADDAD, JR.
Counsel for Petitioner

Rendered: February 15, 1974

COURT OF APPEALS OF KENTUCKY
File No. 73-723

JOHN A. CARDIN APPELLANT

V.

COMMONWEALTH OF KENTUCKY APPELLEE

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE J. HOWARD HOLBERT, JUDGE
Indictment Nos. 71-46 & 71-79

MEMORANDUM OPINION OF THE COURT BY JUSTICE STEPHENSON

Affirming
(Not to be cited as authority)

A Hardin Circuit Court jury convicted John A. Cardin on four counts of knowingly receiving stolen property. KRS 433.290. Cardin appeals asserting error in the denial of a motion for separate trials. He also contends that the Commonwealth failed to prove one of the items had been stolen. We affirm.

The stolen items were all found on property owned by Cardin or in his possession. All the offenses occurred within a relatively short period of time.

The granting or denying of a motion for separate trial, RCr 9.16, is discretionary with the trial court. There is no positive showing of a clear abuse of discretion and prejudice to Cardin's defense in the denial of the motion for separate trials. Russell v. Commonwealth, Ky., 482 S.W.2d 584 (1972).

A rental truck, the item Cardin claims the Commonwealth failed to prove had been stolen, was identified by the owners at a garage where Cardin had taken

the truck to have the chassis lengthened by five feet. The bed had been removed, and Cardin had placed license plates from an older truck belonging to him on the rental truck. The Oregon and Wisconsin license plates, which had been on the rental truck, were found on the floor of the cab. The truck had been rented a few days previously by a Mr. Steele who could not be found at the time of the trial. While the rental company may not have been aware that the truck had, in fact, been stolen, the jury could infer from all the evidence that such was the case. They did so, and the evidence supports the verdict.

The judgment is affirmed.

Osborne, C. J., and Jones, Milliken, Reed, Palmore, Steinfeld, and Stephenson, JJ., sitting. All concur.

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APPELLANT'S PETITION FOR REHEARING DENIED — April 26, 1974

MANDATE

THE COMMONWEALTH OF KENTUCKY
THE COURT OF APPEALS
74 Term—February 15, 1974

JOHN A. CARDIN

vs.

COMMONWEALTH OF KENTUCKY

FILE NO. 73-723

APPEAL FROM A JUDGMENT OF THE
HARDIN CIRCUIT COURT
IND. NOS. 71-46 & 71-79

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

/s/ Frances Jones Mills
Frances Jones Mills, C.C.A.

A copy—Attest:
Issued April 26, 1974

Testimony of Detective Richard McQuown

TRANSCRIPT OF EVIDENCE

Elizabethtown, Kentucky
June 27, 28 & 29, 1972

APPEARANCES

For Commonwealth: Mr. H. L. James
Commonwealth Attorney
Elizabethtown, Kentucky

For Defendant: John A. Cardin, present
and represented by counsel:
Mr. J. Turner Hatcher
Elizabethtown, Kentucky

VOLUME I

June 27, 1972

PORTIONS OF DETECTIVE RICHARD McQUOWN'S TESTIMONY AND DEFENDANT'S MOTIONS TO DECLARE A MISTRIAL

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THE TRIAL OF THE CASE BEFORE THE JURY CONTINUED AS FOLLOWS:

Q 26 Detective McQuown, do you know where John A. Cardin lives?

A Yes, I do.

Q 27 How long have you known Mr. Cardin?

A Since the middle of 1970. I met him personally in October, 1970.

Q 28 Has he ever himself told you who owns the property where he lives?

A Yes, he owns it.

Q 29 Has he told you that?

A Yes, he did.

Q 30 Now, was he present when the tobacco was found?

A Yes, he was.

Q 31 Now, Detective McQuown, will you tell us about the cattle?

A I have additional information on the tobacco; I'll cover that and then I'll move on to the cattle.

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Q 32 All right. Go ahead.

A This was on December the 10th, at 7:00 p.m. when the tobacco was recovered. The investigation centered on three days, primarily, the 10th, 11th, and 12th of December, 1970. On the 12th of December, 1970, I went to the John A. Cardin farm again, to the same house; he owns three farms but this is where his residence is located as well as where the tobacco was located. I went to his farm, and at the time there was a fire in progress behind another barn located beside his house; and he was arrested after a short investigation there, and during the arrest he was advised of his rights; and this was two days later after we recovered the tobacco from the barn. At this time, he admitted to me that the tobacco in the barn—he knew who brought it there, he knew it was stolen, and that it was part of other tobacco that was in the barn also, and that he knew where the tobacco came from.

Q 33 Now, you say you advised him of his rights; what rights did you advise him of?

THE COURT: Let me see the attorneys just a minutes, please.

COURT AND COUNSEL CONFERRED IN THE PRESENCE OF BUT OUT OF THE HEARING OF THE

JURY. THE COURT THEN ADDRESSED THE JURY AS FOLLOWS:

THE COURT: Ladies and gentlemen, we will be out for a few minutes. You may be in recess during that period of time. I'll have Mr. Hugo call you when we return. Remember and observe the admonition heretofore given you.

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WHEREUPON COURT AND COUNSEL, DEFENDANT, AND THE WITNESS McQUOWN RETIRED TO CHAMBERS WHERE THE FOLLOWING PROCEEDINGS WERE HAD:

MR. HATCHER: Your Honor, at this time the Defendant moves the Court to discharge the jury and declare a mistrial for the following reasons: The witness McQuown, without being asked by the Commonwealth Attorney, volunterred to the jury incompetent and very damaging and prejudicial testimony. His Honor has heretofore sustained the Defendant's motion for a severance of some of the counts of this indictment. One of the counts of the indictment is that of arson, and that count is not being tried at this time; nevertheless, the witness testified about that offense and facts concerning it when he referred to the fire and the burning of the truck bed on the Cardin farm which is highly prejudicial to the substantial rights of the Defendant. In addition, the witness McQuown volunteered, without any previous hearing of the Court on its competency, to testify as to a confession made to him by the Defendant Cardin; and this highly irregular activity of his and his introduction of this incompetent evidence will materially prejudice the jury against the Defendant. The Defendant is entitled at this time, in our opinion, to the declaration of a mistrial and discharge of the jury.

MR. JAMES: In opposition to the motion just made by

the Defendant, the witness McQuown did not say the other tobacco was stolen; he said there was other tobacco in the barn; the

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witness McQuown did not say that the truck bed was burned; he said he went there and that there was a fire when he got there, without saying what it was. He said that he had advised the Defendant of his rights; I then asked him what rights he gave him, and we are in here now to get to that point. There has been no evidence that was not competent or not material, and the actions in regard to the attempt to conceal the identity of the truck are certainly, or supposed, owing to the knowledge of the Defendant on these charges, and his other conduct.

THE COURT: I think it's proper for the witness to testify as to how he happened to be there, which he did; and of course, as soon as he said that Mr. Cardin had made certain—or an admission and that he advised him of his rights, that's when I called counsel to the bench and suggested that we should take it up in chambers. Part of the matters that he testified to was that Mr. Cardin told him that he owned property—that is, not property, but the premises. As I understand it, when a confession is testified to, either written or oral, that the Court must determine if it was voluntarily given and must then make findings as to whether it was or whether it wasn't, and that is done outside of the presence of the jury. Of course, that's why we are here; and as soon as I saw where we were getting, that's when I suggested we come out here. I see no prejudice at this point, so I overrule the motion.

MR. HATCHER: I wonder how much trouble it would be to go back and see just what Mr. McQuown said about stolen tobacco. I don't recall identically what he said, but I believe he

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also referred to other tobacco, and if he did, that embodies other offenses that are not being tried also. I wonder if we can check back and see just what he said about tobacco.

THE TESTIMONY OF THE WITNESS McQUOWN ON THIS MATTER WAS READ BY THE COURT REPORTER, AND THE TAPED RECORDING WAS HEARD BY COURT AND COUNSEL.

MR. HATCHER: This information volunteered by this witness was, as I say, entirely voluntary. The Commonwealth had not asked the specific questions, and for that reason the Defendant did not have an opportunity to object. That's the reason the objection did not come until after the testimony came out. In addition to the grounds heretofore set out for a motion to discharge, this witness testified about further tobacco being stolen; I believe the record will show "part of other tobacco." Now, in this indictment there are, I believe, four charges of knowingly receiving stolen tobacco. Three of those charges have been severed from this trial and they pertain to the other tobacco. So this witness has now given evidence of at least two other charges in this indictment that are not being tried now—one that pertains to the charge of arson and the other that pertains to the receiving of other stolen tobacco.

THE COURT: I understand the witness' statement was that Mr. Cardin said that he knew there was tobacco there, and then he said it was part of other tobacco but there wasn't any

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mention of it being stolen tobacco; and of course there was no objection. Let the motion be overruled.

DIRECT EXAMINATION OF WITNESS IN CHAMBERS:

MR. JAMES: Detective McQuown, on December the

12th, you visited the Cardin House and you stated that you arrested the Defendant. At that time, did you advise him of his rights and, if so, what advice did you give him?

WITNESS: I advised him he had a right to remain silent, and that anything he said could be used against him in a court of law. I told him he had a right to an attorney being present before any questioning if he desired one, and I told him that if he could not afford an attorney the Court would appoint one for him. I said did he understand those rights, and he acknowledged that he did, and then he answered the questions I asked him.

MR. JAMES: Did he ask for an attorney, or indicate that he didn't know what his rights consisted of?

WITNESS: He did not ask for an attorney and he acknowledged that he knew his rights.

MR. JAMES: Then, following that, did he make statements to you concerning the tobacco crops?

WITNESS: Yes, he did.

MR. JAMES: Did he make statements regarding other matters also at that time?

WITNESS: Yes, he did.

MR. JAMES: Were they voluntarily made by him?

WITNESS: Yes, they were.

MR. JAMES: Did you make him any promises or offer any inducements for him to give you information?

WITNESS: No, I merely explained to him that he was in an awkward situation, and how bad it looked, and what was involved.

MR. JAMES (Addressing the Court): Judge, the statements made after that are the things that involve replies to the officer's questions on matters excluded by severance. Shall we hear in chambers the statements made on that?

THE COURT: I think we will, yes.

Testimony of Detective Richard McQuown

MR. JAMES: Tell the Court what statements were then made to you by the Defendant, John A. Cardin.

WITNESS: He stated that he'd had this mess going on for some time, and during the discussion he acknowledged that Joe Mike Mouser was responsible for the thefts and he brought the property there and he was selling it, the tobacco, and he had a portion of the Parsley tobacco—a portion of the tobacco we'd recovered from the barn—in the tobacco warehouse over there; and he agreed to turn that over to me the following Monday—this was on a Saturday. And I explained to him the seriousness of the offenses, and what this meant, and how well we'd like to apprehend the persons that were responsible for the thefts of it; and that he shouldn't shoulder all the blame, because I didn't feel he was the one out stealing it—someone else was. He acknowledged that Joe Mike Mouser had brought that there, the trucks that were involved, and—

MR. JAMES (Interrupting): Now, what trucks are you referring to?

WITNESS: The E-Z Haul truck and the Alton Miller Yellow Cab truck. And how the beds had been removed, and how they had been transferred from one truck to another and for

one to be moved to another truck in order to haul more stolen property. I asked him if he would obtain an attorney and come to see you and discuss this case, and he said he would see one and see what he could do. He failed to do that.

MR. JAMES: At that time, Detective McQuown, had the cattle been found?

WITNESS: No, I asked him just before we left there, I said, "Is there anything else here on the farm that's stolen, to your knowledge, that we can clear up right now and remove to keep from having to come back later, to keep this thing going

all the way along." and he said, "Yeah, there is some cattle here." and I asked him how many, and he said, "Twenty or twenty-five," and he showed them to me, and the owner was called that had cattle missing, and he came there and identified his cattle, and they were released to him, one day later. He told me how Mouser had explained to him how the cattle were loaded and the tailgate fell out and he dropped some of—some of the cattle fell out of the truck and he had trouble with them; and he got hung up when he was stealing one crop of tobacco and had to steal a tractor to pull it out; and all this in the investigation that was made was just as he said it was. These things happened. The tailgate came out and the cattle went off on the road and were strayed and they were returned to the owner of the cattle. The tobacco crop that was stolen in—which is not involved in this case—and how it was stolen, and this was verified to have happened that way, using the theft of the tractor

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to pull the truck out of the mud. All this corroborated what he told me. He told me he'd deliver me that tobacco Monday, and he did so. He took me to Greensburg, Kentucky. He followed my car, and he drove with his wife and Finis Durrett who was here, the manager of the Greensburg Tobacco Warehouse, and part of that tobacco was also Mr. Parsley's tobacco.

MR. JAMES: Did or not Mr. Parsley receive some payment for the tobacco that was sold on the Greensburg floor?

WITNESS: Yes, he did. It was a very difficult situation to divide several crops of tobacco that were all in one bundle, and they came upon an agreement. Mr. Parsley's tobacco was identified there, and he agreed upon a certain amount of it and it was returned to him there at the warehouse, as well as to the tobacco he had picked up at the barn.

MR. JAMES: The statement that you made concerning

the Parsley tobacco—you said there was other tobacco there. Is that what you said?

WITNESS: Yes, he told me he hauled that tobacco out on a Sunday afternoon and paid a colored man by the name of Feathers six dollars to help him load it; and he told me what truck he loaded it on and it was the truck that belonged to Alton Miller containing a truck bed that I know was recovered before and it was stolen from the Irwin and Miller Company in a bad-check case; and it had turned up back there again and it was used to haul this stolen tobacco of Albert Parsley's.

I further state that he admitted all of this knowing full well of his rights.

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MR. JAMES: Was anyone present when the statements were made?

WITNESS: No, and the reason for that is because Joe Mike Mouser was in the pick-up truck owned by John Cardin with Mike Kaphammer, and Martin Eugene Alvey was under arrest at that scene and in my custody. Detective Chambers was in pursuit of Mouser and Mike Kaphammer, and they fled into the woods and were unapprehended. And then after we completed what investigation was necessary at the Cardin residence, we drove by his garage on the way to the State Police Post, and he said, "My stomach's killing me; I want to get a 7-Up or Sprite or something." We stopped, and while we were in there having a soft drink, the phone rang and he picked it up to answer it, and he allowed me to listen in on the call, and I know the phone conversation was between him and Joe Mike Mouser; I've received numerous phone calls from Mouser and I knew his voice, and the conversation was directed toward him; there's no question whatsoever about the person or party on the other end of the line. I made some notes to have him to ask Mouser certain questions that I

wrote out for him, and he asked those questions, and I've got the notes in my pocket. He asked those questions and Mouser answered them. The following morning, while he was in the courthouse here, Mike Kaphammer was in an examining trial for an altercation at Jerry's Restaurant, and he looked in at the county courtroom and said, "There's the bushy-headed boy right there that was with Mouser," and he was known to me as Mike Kaphammer.

MR. JAMES: And Joe Mike Mouser was the man that he said brought the stolen property to him?

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WITNESS: Yes, him and others. He didn't know the names of those others. He explained to me that at times they were brought there during the night, and Mouser would call him the next morning and tell him they were there. He has three farms and there was property on all of them that's connected with these four cases on trial.

MR. JAMES: What property were the cattle on?

WITNESS: On the Cardin residence farm.

MR. JAMES: And what property was the tobacco on?

WITNESS: On the Cardin residence farm.

MR. JAMES: And what place were the trucks or parts of trucks on?

WITNESS: The Alton Miller truck was where his son-in-law, Butch, resides. The E-Z Haul bed off of the E-Z Haul truck was on this third farm where there's a tenant house with no one residing in it.

MR. JAMES: There was property on the three places?

WITNESS: Yes, there was.

MR. JAMES: And that is the property involved in the four counts that we are trying?

WITNESS: Yes, sir.

CROSS EXAMINATION OF WITNESS IN CHAMBERS:

MR. HATCHER: Now, Mr. McQuown, you say that all this conversation took place, from which you've undertaken to make out a case, and that there was no one present but you and John A. Cardin; is that right?

WITNESS: Well, Martin Eugene Alvey was present, but he wasn't in range to hear our conversation.

MR. HATCHER: No one heard that except you and John Cardin?

WITNESS: That is correct.

MR. HATCHER: Now, with all this damaging testimony and all this criminal case that you was working on—did you have this written out and have Mr. Cardin sign it?

WITNESS: No, he didn't want to do that until he consulted with his attorney, and what he would testify to and whether he would consult with Mr. James or not was left up to him for a later decision.

MR. HATCHER: Haven't you been on the police force long enough and been around courts enough to know that when you have a statement down in writing and have the person sign it, that that is by far better evidence than oral proof?

WITNESS: That's correct.

MR. HATCHER: Then why didn't you have him sign—why didn't you write this down and have him sign it if it was so voluntary and if all this is so true?

WITNESS: He requested not to do that until he consulted with his attorney later.

MR. HATCHER: Did you request him to sign a confession?

WITNESS: Yes, I did. I asked him for a confession in writing.

MR. HATCHER: Did you write one out?

WITNESS: No, I did not. I explained that he wanted to

wait.

MR. HATCHER: When he declined to sign anything, didn't that give you some idea that there might be something wrong with it?

WITNESS: No, sir.

MR. HATCHER: Now, you appeared as a witness in a case against Alvey for burning a truck bed?

WITNESS: Yes, sir.

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MR. HATCHER: And you said Alvey was one of the individuals there when you got all this confession. You didn't testify to any of this confession or any of those facts in the Alvey trial, did you?

WITNESS: You objected.

MR. HATCHER: Well, did you undertake to relate it?

WITNESS: I would have liked to, but you objected on the—

MR. HATCHER: I didn't ask you what you'd have liked to do. I asked you if you undertook to, if you tried to introduce or volunteered that information at the trial?

WITNESS: Yes, I'm certain of that.

MR. HATCHER: And you've volunteered again in this trial; in fact, you've come out with matters without the Commonwealth even inquiring into them, and you're very anxious to get it in the record, aren't you?

WITNESS: No, I wanted to keep it in continuity. Mr. James wanted to go on to a second case, and I was not completed with the first one. I wanted to keep it in continuity.

MR. HATCHER: Let me ask you again about the Alvey trial. This confession and narration of all these events—did you testify to any of that in the Alvey case?

MR. JAMES: Judge, I don't recall all the details of it, but that certainly was not competent at that time in the Alvey trial. The question that Mr. Hatcher asked him was not com-

petent testimony in the Alvey trial, and it was not sought to be introduced. Whether or not there was any mention made of it, I don't know, but the Court would have excluded it; there were several places that these cases interwove so that there were objections to testimony on the basis that it involved other offenses.

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THE COURT: Go ahead, Mr. Hatcher.

MR. HATCHER: Now, you knew that Mr. Cardin and Mr. Alvey were both indicted for burning this truck bed, didn't you?

WITNESS: Yes, sir.

MR. HATCHER: And Mr. Cardin, according to your charges, was a confederate of Mr. Alvey in the truck bed burning?

WITNESS: Yes, sir.

MR. HATCHER: Yet, today you testify about all these admissions and confessions and you didn't testify about them in the Alvey trial?

WITNESS: Because you objected, I did not.

MR. JAMES: Again, might I interrupt and state that Alvey alone was indicted, and the charges against Mr. Cardin were in a separate indictment. That was not a joint trial.

MR. HATCHER: All right, let me ask you something else now. Did you know also that Mr. Alvey was indicted for knowingly receiving stolen property consisting of this 1965 Chevrolet truck that's referred to as the U-Haul?

WITNESS: Yes, sir, I was responsible for the testimony before the grand jury.

MR. HATCHER: And you knew that Mr. Cardin likewise was indicted for knowingly receiving that property, didn't you?

WITNESS: Yes, sir.

MR. HATCHER: And you appeared as a witness in the

Alvey case, did you not?

WITNESS: Yes, sir.

MR. HATCHER: And did you give any evidence in the Alvey case concerning the information you've just testified to that you got from Mr. Cardin about the truck—the '65 Chevrolet truck?

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WITNESS: Pertaining to the furniture pads, there was some testimony given.

MR. HATCHER: I know, but about the truck.

WITNESS: They were parts of the truck.

MR. HATCHER: Furniture pads are not part of a truck.

WITNESS: They were part of the truck as it left the owner; they were identified as their property.

MR. HATCHER: All this confessional information you didn't reveal in the Alvey trial; you say I objected to it.

WITNESS: Yes, sir.

MR. HATCHER: Well, I've got a transcript of the Alvey trial; we'll let the record speak for itself. We have it on record what you swore to now and what you swore to then.

WITNESS: Well, that may have been in chambers when that occurred about what you—where I would be allowed to testify to what John Cardin said there, because he was not on trial.

MR. HATCHER: While you're testifying, did you promise John Cardin that if he would appear as a prosecuting witness against Joe Mike Mouser and Charlie Stiles that you would see that he was not prosecuted?

WITNESS: No, sir, that's not correct. I advised him to obtain an attorney and then consult me and the Commonwealth Attorney while his attorney was present, and he did not do it.

MR. HATCHER: And did you threaten him that if he did not appear as a witness and give evidence against Mouser and

Stiles that you was going to prosecute him?

WITNESS: No, not in that threat; I had no choice but to prosecute him. He was the receiver of this property, and I'd have liked at that time, as I explained to him, to arrest the persons responsible for the theft of it, and I could have used his knowledge of it and his testimony. I also

was emphatic about having him obtain an attorney to meet with Mr. James. That could not be any fairer, in my opinion.

MR. HATCHER: Now, you said you arrested him there before you got all this confession from him; he was under arrest and he was your prisoner at that time, was he?

WITNESS: Yes, sir.

MR. HATCHER: What had you arrested him for?

WITNESS: Well, as I explained, I went there on the basis of the fire. His first arrest was on the fire, but I wasn't allowed to testify to that and I did not try to interject that.

MR. HATCHER: So you arrested him there in connection with the fire, is that right?

WITNESS: Yes, sir, I did. That was the cause of the arrest.

MR. HATCHER: And after you had him under arrest, you say you got this confession out of him about all these other things, is that right?

WITNESS: Well, all this took place at the same time. It was quite hectic at that time, people running through the woods and police cars and sirens screaming up and down the road, and the fire was in progress and we were trying to put it out to keep from destroying the bed, and Alvey trying to leave the scene at the time—it was quite hectic.

MR. HATCHER: Well, John wasn't running through the woods, was he?

WITNESS: No, he just stood there quietly and calmly.

MR. HATCHER (addressing the Court): Your Honor, as

another ground for my motion to discharge the jury because incompetent

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evidence had been volunteered against the Defendant, is this evidence of the arrest. This witness has volunteered to the jury, without being asked and before an opportunity was given for an objection, that he arrested Mr. Cardin on that occasion. He now admits that that arrest was not for any one of these four offenses that he is being tried for now, but he arrested him on the arson case which is not before the jury at this time; but the jury does have in the back of their minds now this arrest for an arson case, and that is additional damaging evidence that has been brought out before this jury.

MR. JAMES: There has been no statement at all as to what the arrest was made for—just simply that he was arrested. There are pending charges that are not being tried that do include the arson charge.

THE COURT: Do you have any further cross examination, Mr. Hatcher?

MR. HATCHER: No, sir.

THE COURT: Did Mr. Cardin want to testify relative to the voluntariness of the statements?

MR. HATCHER: Well, of course, Your Honor, this is all entirely new and surprising, and I would like to have a few minutes to confer with Mr. Cardin on this phase of it. I've never discussed it with him because I didn't know that this evidence would be introduced or tendered for introduction.

THE COURT: The testimony of the Defendant would, of course, be limited to the voluntariness of the statements.

MR. HATCHER: Yes, sir. Might I confer with Mr. Cardin on that matter?

THE COURT: Yes, sir.

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DEFENDANT AND COUNSEL CONFERRED OFF THE RECORD.

MR. HATCHER: Your Honor, as I understand the status of this evidence at this time, the inquiry will be only on the question of whether or not any statements made by Mr. Cardin were voluntarily made. Now, our evidence will be that these statements were not, in fact, made; so it would be rather difficult to go into the question of whether the statements were voluntarily made when our position will be that they were not made at all. Of course, if the matter becomes competent—if it becomes competent, of course that will be a question for the jury rather than the Court whether or not the statements were made.

THE COURT: Yes, if you are going to deny that the statements were made, then the purpose of this hearing really does become moot.

MR. HATCHER: Yes, sir, that is our position. To attack the voluntariness of a confession, I think you have to take the position that it was not made voluntarily; but if you're denying that you made it at all, there's nothing that we can testify to on the question of voluntariness. In other words, we can't say we did something and it wasn't voluntary and then turn around and say we didn't do it.

THE COURT: I hope you understand that I didn't know what your testimony would be when we came in here.

MR. HATCHER: Yeah, I understand that. So we don't have anything to introduce for Mr. Cardin at this time.

THE COURT: What happens is, that it resolves into a jury matter as to whether they were in fact made or not made. On

the voluntariness of it, if a person were admitting that they made statements and claiming that they made them involuntarily, then the Court would have to pass on it and then it is

still a question for the jury. But when there's a conflict, a direct conflict, as to whether statements were made or were not made, then I think it is a question for the jury.

MR. HATCHER: I'm objecting, of course, from my position now—I am objecting to all this conversation and these alleged statements for another reason. The other four offenses are so interwoven with them that I don't see how the Court can let this witness testify to what he has in chambers here without the jury receiving all sorts of information on other charges against him, made or not made, for which he is not being prosecuted.

MR. JAMES: Judge, while it is generally true that evidence concerning other offenses cannot be shown, where it is so tied up in a general plan or scheme, there is an exception as to intent and purpose and knowledge, and such evidence does become competent.

THE COURT: Well, I think it was proper for the witness to state why he was there; he did state that Mr. Cardin was arrested but he didn't state what for. Certainly, everyone must know that he was arrested some time or other or that he came within the jurisdiction of the Court and that charges were brought against him. I will admonish the witness, however, to answer the questions that are asked by the Commonwealth Attorney and not to volunteer information.

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MR. HATCHER: Now, another grounds for objecting to the testimony of this witness which he has given in chambers and which I assume the Commonwealth Attorney is going to ask for before the jury, is that the testimony given by the witness shows that it is a summation by him of what took place. I don't think the witness has a right to summarize and give a conclusion of what was said. I think he might repeat it word for word, if he can do that, but apparently he cannot do that, he hasn't done that; all he's done is give his narration in

summary form of the conversation and the import of it, and I'm objecting to it for that reason.

THE COURT: Well, the witness, of course, like any other witness, is bound to the facts that he saw or thinks that he heard. Certainly he cannot give it word for word, but he must give it as nearly as possible as he can as the matters were stated to him, or as he claims they were stated to him, I'll put it that way.

MR. JAMES: He will, when he testifies, relate as nearly as he can what he was told, not his conclusions.

THE COURT: That's right, not his conclusions. His conclusions are not competent, but he can state what he was told.

The motions to discharge the jury for a mistrial are overruled.

WHEREUPON COURT AND COUNSEL RETURNED INTO OPEN COURT. THE TIME FOR NOON ADJOURNMENT HAVING ARRIVED, THE COURT ADMONISHED THE JURY AS REQUIRED BY LAW, AND INSTRUCTED THEM TO RETURN IN ONE HOUR.

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AT 1:00 P.M., CAME COURT AND COUNSEL INTO OPEN COURT AND THE TRIAL WAS RESUMED AS FOLLOWS:

THE COURT: Are you ready to proceed, gentlemen?

MR. JAMES: Ready, Your Honor.

MR. HATCHER: Yes, Your Honor.

THE COURT: Waive the call of the jury?

MR. JAMES: Waive the call, Your Honor.

MR. HATCHER: Yes, Your Honor.

EXAMINATION OF THE WITNESS, RICHARD McQUOWN, CONTINUED AS FOLLOWS:

DIRECT EXAMINATION BY MR. JAMES:

Q 34 Detective McQuown, you had testified about recovering the tobacco before the adjournment; now did you or not recover the truck that belonged to Alton Miller?

A Yes, I did.

Q 35 Will you tell the jury about how that was found, and where, and what happened in connection with that truck?

A After making the initial investigation on the tobacco, the following day I went to the airport here in town, north of town, and Ben Floyd flew me over John A. Cardin's farms, and by aerial photography and surveillance, I located a 1965 Chevrolet truck owned by Alton Miller of the Yellow Cab Rental Company in Bowling Green, and the bed off of another truck—the E-Z-Haul truck—on the second farm.

Q 36 Where was the Alton Miller truck?

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A It's either KY 84 or 86 that runs through Sonora; it's about two miles out. Mr. Cardin's son-in-law resides on that farm.

Q 37 What is his name?

A I just know him as Butch.

Q 38 But you do know that he is the son-in-law of Mr. Cardin?

A Yes, I do. The truck could be seen from the highway as well as by airplane, and I have a photograph of the truck from the highway and I also have a photograph of the truck from the airplane. I'd taken a search warrant for the truck, and I went to the farm with the search warrant and recovered it.

Q 39 Now, when you recovered that truck, what condition was it in?

A The truck was a two or two and a half ton 1965 Chevrolet, and the only part of it on the farm was the cab and the frame—the chassis—and the front and rear wheels. The

bed was removed from the truck.

Q 40 Do you know of your own knowledge what type of bed had been on it?

A Yes, I do.

Q 41 What type was it?

A A moving van bed, enclosed body.

Q 42 And did or not you find that bed anyplace?

A Yes, I did.

Q 43 Where was it, Detective McQuown?

A It was behind John A. Cardin's house, right behind the barn next to his house.

Q 44 Was the bed as it was when it was on the truck?

A No, it had been cut up and partially destroyed, and when I arrived at the farm it was on fire.

Q 45 You say the bed was on fire; was that the entire bed?

A The bed consists of the wooden floor and the metal frame around it, and then the walls and the roof and the doors and the front portion of the bed had been cut away and they were gone; they weren't even there. The only portion remaining was if it were a flat bed truck that had the walls cut off of it on each side; and it was off of the truck and it was laying on the ground.

Q 46 Now, where was that located, that part of it?

A Well, it was directly behind John A. Cardin's house and barn adjacent to it.

Q 47 Now, was the truck and the part of the body or bed removed from the Cardin place?

A Yes, it was.

Q 48 Where was it taken?

A It was taken to Irwin Miller's Garage just north of town on 31W.

MR. HATCHER: May I approach the bench, Your

Honor?

THE COURT: Yes, sir.

THE FOLLOWING REMARKS WERE MADE AT THE COURT'S BENCH, OUT OF THE HEARING OF THE JURY:

MR. HATCHER: Your Honor, I object to this testimony concerning the burning of the truck, and I again move to discharge the jury because evidence of another offense has been introduced and we are not trying this case; this was severed from the case being tried, and the introduction

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of this testimony is prejudicial to the substantial rights of the Defendant.

MR. JAMES: Your Honor, this evidence goes to the condition of the truck, and knowledge and purpose and intent to conceal it, and has nothing to do with any charge of arson.

THE COURT: I think it's competent to show it; let the objection be overruled. But, again, I know you will keep as far away as you can from the other charges.

MR. JAMES: I am trying to, but it all just ties together so if you try to prove one thing you get into maybe something else; but it is all competent.

THE COURT: Well, he's not testifying that there's any charge about that, so I think it's competent. Overrule the objection.

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Q 124 Then it was on December the 12th that you went there to the residence?

A Yes, it was.

Q 125 Now, what did you do, and what did you see, and what did you hear on that occasion?

A As I arrived at John A. Cardin's residence and began to

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turn into the driveway, I met a green Ford pick-up truck driven by Williams, an employee of John A. Cardin's, coming out of the driveway. I stopped him and obtained his identification, and I looked in the truck bed and there were some heavy tools in the rear of it. I sent him on back to the garage and told him I'd contact him later. As I proceeded into the driveway, John A. Cardin was walking from his house and barn area out toward the road to meet me. He confronted me about half-way up the driveway and immediately behind him was a car, an Oldsmobile, following him out being driven by one white male. I asked John A. Cardin, "What's on fire?" and he said, "I'm just burning an old truck bed back here," and I asked him if he cared if I looked at it, and he said, "No, I guess not." He walked back there with me. At the fire, which smoke was coming from, was the Alton Miller lower section of the truck bed. It was on fire at the time. It was covered with some sort of fuel oil or kerosene—

MR. HATCHER (Interrupting): Your Honor, we'd like to object to him saying what—

THE COURT (Interrupting): Objection sustained. That's right. You may state what you saw—not what it appeared to be or anything else—just what you saw.

A (Continuing): There was a liquid on the bed and it was on fire.

Q 126 What was then done, Detective McQuown?

A Well, I examined the truck bed. The walls had been cut from it by—

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MR. HATCHER (Interrupting): We object.

THE COURT: Sustained. Just testify to what you saw, and not what had been done because you weren't there.

A (Continuing) The supports on the top portion of the bed had been cut by torch or burned—

MR. HATCHER: Your Honor, we object and I move that this witness be admonished.

THE COURT: Sustained. If the upper supports were not there, Officer, just state that they were not there.

A (Continuing) They were removed.

Q 127 Was there any conversation with Mr. Cardin after that, Officer?

A Yes, there was. He was placed under arrest.

Q 128 Wait just a minute, now. Where did that conversation take place?

A It took place behind the barn immediately adjacent to his house.

Q 129 Now, on that occasion and at that place, what occurred? What did you do?

A Well, after observing the truck bed—John A. Cardin was there with me—I immediately recognized the truck bed, and I placed him under arrest and advised him of his rights.

Q 130 When you advised him of his rights, what rights did you advise him of?

A That he had a right to remain silent and that anything he said could be used against him in a court of law; I advised him he could have an attorney with him before any questioning if he desired one, and I advised him

that if he could not afford an attorney, the Court would appoint one for him; and I asked him if he understood those rights, and he stated that he did, and he agreed to questioning.

Q 131 Were questions then asked him after that?

A Yes, they were.

Q 132 And did or not he answer them?

A Yes, he did.

Q 133 Did he at any time refuse to answer or ask for

an attorney?

A No, he did not.

Q 134 And did he appear to understand his rights?

MR. HATCHER: We object.

THE COURT: Sustained. Not how he appeared.

Q 135 Did he state that he understood his rights?

A He acknowledged that he did understand his rights.

MR. HATCHER: Your Honor, I object to this questioning unless he can repeat the conversation if he remembers the conversation. I'm objecting to him narrating, and drawing his conclusions to what the man did or what he said.

THE COURT: Well, he stated that he had a conversation with him. I think you might just have him repeat the conversation, Mr. James.

MR. JAMES: That's what I'm trying to do, Your Honor.

Q 136 Now, what took place and what was said as near as you can in the words used by you and Mr. Cardin; don't give your interpretation of it, but just tell us what was said.

A Well, I discussed with him the truck bed that was there—

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MR. HATCHER: We object.

THE COURT (Addressing witness): Well, what was said about the truck bed?

A He advised me that the truck bed was brought there by another person, and that he was removing it, dismantling it, and burning it.

MR. HATCHER: I'm not objecting to him relating the conversation; I'm objecting to him drawing conclusions as to what he was advised or what he was not advised. If he has a conversation, then I believe he can relate it, but he cannot give a narration or a summary of what anybody told him or

what he told anybody else.

THE COURT: Overruled. I understood him to say that this was part of the conversation; that Mr. Cardin told him this.

Q 137 Is or not that what Mr. Cardin told you?

A Yes, he told me that he cut the truck bed up himself; that he'd carried part of it away by truck to another location.

Q 138 Now, what else, if anything, did he tell you?

A He told me who brought it there.

Q 139 Tell us what he said, in his words.

A He told me that Joe Mike Mouser brought the truck bed there and that he brought the tobacco in the barn there to the farm, and that he himself had cut this truck bed up and removed portions of it to the other farm to the west, and that he'd buried it—had a bulldozer there to bury it—and I asked him if anyone else was with Joe Mike Mouser at the time and he said he didn't know their names but there were others there at the time. I asked him

about Mr. Alvey, who was present, if he was there at the time during which any of these vehicles were brought—

MR. HATCHER: Your Honor, I submit that he is narrating, not testifying to the conversation.

THE COURT: Just testify to what the conversation was, Officer.

MR. HATCHER: If you overrule my objection, I can't stop him from going ahead and narrating it; but I want the Court to know it's over my objection.

THE COURT: Officer, can't you just testify as to the conversation between you and Mr. Cardin?

WITNESS: I'll try, but it's difficult.

* * *

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Q 144 What, if anything, did he say then about the trucks?

A He told me that he took the bed portion of this truck that was on fire there and had buried it on the back of one of his farms with a bulldozer; he had a man to do this. And that the E-Z-Haul truck bed had been brought in there after he built a bridge across the road there—the bridge had been washed out—and he had a bulldozer man in there to do that, so he just had him to cover that bed up at the same time. And then when the bridge was built, this truck bed was brought in there. He said about the E-Z-Haul truck that was brought to Edlin's Machine Shop, he told me that he called Edlin's and told them he was bringing a truck up there and that he was going to have it worked on for a man that brought it in, a customer; and he told me that he drove it there himself to Edlin's Machine Shop.

Q 145 Did he or not tell you of any use of that truck by him?

A Yes, he did.

Q 146 What did he say?

A He told me that he hauled some of the tobacco that belonged to Albert Parsley that we've been discussing to a tobacco barn, and he'd show me where that tobacco was Monday—this was on a Saturday, the 12th of December, 1970; he indicated that on the 14th, he'd tell me where the tobacco was, that he wanted some time. I insisted, two or three different times, to tell me where it was for fear it would be lost; and he refused, and said,

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"I'll just wait until Monday, just take my word for it and I'll tell you where the tobacco is Monday." So I had no other choice. He told me he took the tobacco to the warehouse—

Q 147 (Interrupting) Now, was this on Monday that

he told you this?

A Yes, on Monday. He told me while we were standing there; there was a flat bed off of another truck laying beside the burning one, and he said, "I hauled the tobacco on that bed right there."

Q 148 Did he say what vehicle the bed was used on?

A Yes.

Q 149 What vehicle was it?

A They had put that black wooden cattle bed, flat, on the Alton Miller 1965 Chevrolet truck which was in the telephoto lens photo, and then they'd removed that bed from it and they were going to take that bed because that truck was breaking down all the time on these trips these fellows in it was involved in; it wasn't good enough for them so they wanted a good truck, and so that's why they were going to put the bed on the 1970 new Chevrolet E-Z-Haul truck, and that's why the frame was being lengthened.

Volume II

June 27, 1972 (continued)

MR. A. O. BINGENHEIMER'S TESTIMONY

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A. O. BINGENHEIMER, CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

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DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name A. O. Bingenheimer?

A Yes, sir.

Q 2 Where do you live, Mr. Bingenheimer?

A Minneapolis, Minnesota.

MR. HATCHER: I wonder if we could get you to spell your name?

WITNESS: B-i-n-g-e-n-h-e-i-m-e-r.

Q 3 By whom are you employed?

A National Car Rental.

Q 4 Now, what, if any, is the connection between that and E-Z-Haul?

A E-Z-Haul is a wholly owned division.

Q 5 So E-Z-Haul is owned by National Car Rental?

A Yes, sir.

Q 6 Mr. Bingenheimer, were you ever, in the course of your employment, located in Louisville, Kentucky?

A Yes, sir.

Q 7 What period of time were you there?

A Up until January of '71.

Q 8 You were there, then, during November and December of 1970?

A Yes, sir.

Q 9 Now, during the month of December, 1970, was a 1970 Chevrolet truck, green in color, I believe, rented by E-Z-Haul to a James H. Steel?

A Yes, sir.

Q 10 Is that the rental contract for that truck?

A Yes.

Q 11 Now, under this contract, for what period of time was the truck rented?

A I believe it's December 5th through the 7th—let me see here. Yes, through December the 7th.

Q 12 Now, on December the 7th, was the truck supposed to be returned under that rental agreement?

A I'm looking for the return date, sir. I don't see it right off.

THE COURT: Mr. James, I'm afraid no one is hearing

Mr. Bingenheimer.

MR. JAMES: I might stand back a little, that might help.

A (Continuing) I don't see the return date on here, sir.

Q 13 Was the truck returned during the rental period?

A No, sir.

Q 14 Was or not it reported as stolen or converted?

MR. HATCHER: We object to what was reported.

THE COURT: Sustained. Just what happened.

Q 15 Well, tell the jury just what happened, Mr. Bingenheimer.

A Well, we received a call from the State Police Post in E-town requesting a serial number—

MR. HATCHER: We object.

THE COURT: Well, he may state whether the truck was returned or what he knows about it. Now, calls that he got from someone else, I doubt if they're competent.

MR. JAMES: I'll ask him this, Judge, to make it clear.

Q 16 Did or not you come to Elizabethtown in connection with that truck?

A Yes, sir.

Q 17 Where did you go, Mr. Bingenheimer?

A I went down the street to a garage down here.

Q 18 And did or not you see the truck?

A Yes, sir.

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Q 19 Now, you say you went down the street down here. Do you know the name of the place you went?

A Edlin's, I believe, is the name of it.

Q 20 Edlin's Machine Shop?

A Yes, sir. Edlin's.

Q 21 Now, there, did you or not see your truck or any part of it?

A The cab and chassis were in the shop, sir.

Q 22 Now, did or not it have a serial number?

A Yes, sir.

Q 23 What was the serial number of the cab and chassis?

A Let me see. The serial number was CE-530-P-157436.

Q 24 And was that number on the chassis?

A Yes, sir.

Q 25 Did you see the body of the truck anywhere?

A Not at that garage, sir.

Q 26 Where did you see the body of the vehicle?

A It was on a hillside out here in the country somewhere.

Q 27 How did you get to where it was, Mr. Bingenheimer?

A I went with Mr. McQuown and some other officer.

Q 28 Was it Detective McQuown and maybe Detective Chambers?

A Yes, sir.

Q 29 Do you know yourself where you went and saw it?

A By name, I don't know.

Q 30 Was the body that you saw the body of your truck?

A Yes, sir.

Q 31 At the place you did go?

A Yes, sir.

Q 32 Mr. Bingenheimer, I show you Commonwealth Exhibit No. 19 and ask you if you recognize that?

A Yes, sir, I do. It's a rental contract folder.

Q 33 Will you speak out louder?

A It's a rental contract folder which we use in our truck rental business.

Q 34 Now, I'll show you two license tags, they being each, Oregon at the top, and T297629, and ask you if you know anything about those license tags?

A They belonged to this particular truck.

Q 35 To the '70 Chevrolet we've been talking about?

A Yes, sir.

Q 36 Now, on each tag is written some letters and some numbers. Do you see that on each one of these?

A Yes, sir.

Q 37 Does that have any significance, and if so, what?

A It's an identifying number for our own purposes; it's a unit number that we assigned to that particular vehicle.

Q 38 And is this number B04836?

A Yes, sir.

Q 39 Assigning it to what vehicle?

A Well, to that particular Chevrolet that we were—

Q 41 (Interrupting) The 1970 Chevrolet?

A Yes, sir.

Q 41 Now, had that vehicle had any license in the month of December, 1970, other than this Oregon license?

A Yes, sir, it should have had a pro-rate—or it did have a pro-rate plate assigned to it.

Q 42 What is that?

A Well, it's an additional plate that you don't have here and I don't recall that I ever saw it on the truck or the body.

Q 43 Now, have you given anybody—James H. Steel, or anybody else—permission to keep this truck beyond December the 7th?

A No, sir.

Q 44 Or to remove the body from it or to make any changes of any kind to it?

A No.

Q 45 Mr. Bingenheimer, I'll show you Commonwealth Exhibit No. 16 which has been identified as being a picture of license plates in the cab of the vehicle. Would you examine that picture and state whether or not you know what those tags are that are shown in that picture?

A Yes, sir, the Oregon plate which we have here, and the pro-rate plate which I just mentioned, the Wisconsin pro-rate plate.

Q 46 Now, the pro-rate plate which you say is a Wisconsin plate, was also on the vehicle as well as the—

A (Interrupting) Normally, yes, sir, on the front of the vehicle.

Q 47 And that was the pro-rate plate, the Wisconsin plate?

A Yes, sir.

Q 48 Mr. Bingenheimer, did you make an examination of the chassis of the truck, of whether or not any changes had been made in it?

MR. HATCHER: Your Honor, I object. I think he can only testify to what he saw.

THE COURT: Just what he saw. That is correct.

Q 49 Well, did you make an examination?

A Yes, sir.

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Q 50 Did you see anything about it that you noticed?

A Yes, sir. The chassis had been altered—lengthened.

MR. HATCHER: We object, and move that the witness be admonished for defiance of the Court's order. He said the length—

THE COURT: He said what he saw was that the chassis

had been altered. What did you notice about the chassis (addressing the witness)?

WITNESS: It was lengthened, sir. An additional length of steel was put in the frame which resulted in a longer chassis in the truck.

Q 51 And you saw that yourself?

A Yes, sir.

Q 52 And did you see and observe the body?

A Yes, sir.

Q 53 What, if anything, did you notice about the body, and what did you see?

A The E-Z-Haul identification had been removed from it, or attempted. It was obliterated.

MR. HATCHER: I guess there's not any use in objecting, Your Honor, as long as he's said it.

THE COURT: I think he's stating what he saw. I mean that—

MR. HATCHER: Okay.

THE COURT: What he observed; not what he assumes somebody else might have done. But the witness may testify to what he saw himself.

MR. JAMES: You may cross examine.

CROSS EXAMINATION BY MR. HATCHER:

Q 54 Mr. Bingenheimer, are you still with the National Car Rental or are you in some other business now?

A I'm with National Car Rental.

Q 55 Now, I take it you have no personal knowledge of having rented this truck or leased it out to this man Steel, do you?

A No, sir.

Q 56 All you have to go on is the record which has been filed here, and some testimony which was found in the cab of the truck?

A That is correct.

Q 57 And whatever agreement there was between Steel and the car company you work for, all you know about it is what is embodied in that contract, is that right?

A Yes, sir.

Q 58 You don't have any knowledge of any agreement or understanding with Steel except what's in that contract?

A None, sir.

Q 59 And according to that contract, the truck was leased out on December the 5th, 1970, and is there anything in that contract stating when that truck was to be returned?

A I don't see it in this particular one.

Q 60 So if that truck was delivered to Steel on that date pursuant to that agreement, Steel rightfully had possession of it at that time, didn't he?

A That's correct, sir.

Q 61 Now, what was done with the bed and the chassis of that truck after you found them down here, you say?

A Well, I really don't know. They were towed into a garage here, I'm not exactly certain where; I don't go personally in with them.

Q 62 Was either one of them sold to anyone?

A The truck eventually was sold.

Q 63 How about the bed?

A I really don't know. I had left town and it was handled by an attorney here in E'town, the sale of the vehicle.

Q 64 What attorney?

A Collier, I believe—Mr. Arnett.

Q 65 Are they the attorneys for your collision insurance carrier?

A Not to my knowledge.

Q 66 You did have collision insurance on them, didn't you?

A No, sir.

Q 67 Doesn't that contract say you did?

A No, sir, it doesn't.

MR. HATCHER EXAMINED RENTAL CONTRACT

Q 68 Well, it says collision damage waiver, $250.00 deductible applies excepted. Well, you've got it in fine print over here and I can't read it.

A That's true.

MR. HATCHER: I believe that's all.

REDIRECT EXAMINATION BY MR. JAMES:

Q 69 Mr. Bingenheimer, what position did you hold with the local office of your company?

A I was the Operations Manager.

Q 70 As such, were you in charge of the rental vehicles?

A Yes, sir.

Q 71 Were you or not, or are you familiar with the fair and reasonable market value of this vehicle in December of 1970 in this area?

A Approximately, yes, sir.

Q 72 What would that be?

A Probably in the neighborhood of $5,000.00 at that time.

MR. JAMES: That's all.

RECROSS EXAMINATION BY MR. HATCHER:

Q 73 When had you last seen this particular vehicle?

A When had I last seen it? Before when, or what time, sir?

Q 74 Before it was leased out to Steel.

A I couldn't say that I myself had seen it prior to

that time.

MR. HATCHER: Your Honor, I move that his testimony concerning the value be stricken.

THE COURT: Do you want to interrogate him further, Mr. James?

MR. JAMES: I do, Your Honor.

REREDIRECT EXAMINATION BY MR. JAMES:

Q 75 Mr. Bingenheimer, you say that you don't recall, or you don't know whether you had seen it before that time?

A That is correct, sir.

Q 76 Were you. in general, familiar with the vehicles, whether this particular one or not, in your custody and under your control?

A Yes, sir.

Q 77 Now, were or not those vehicles under your control in the operation of this office?

A Yes, sir, they were.

Q 78 And kept and maintained under your supervision?

A That is correct.

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Q 79 Now, would or not you keep and maintain a vehicle that had a value of less than a hundred dollars?

MR. HATCHER: We object. If he don't recall ever seeing this vehicle, I don't see how he can give any opinion on the value of it, Your Honor.

THE COURT: Well, he saw it here.

MR. HATCHER: He never saw it before, though.

Q 80 Would you keep a vehicle that was worth under $100.00?

A Not normally, no, sir.

Q 81 And in this type of business, do you or not have to keep your vehicles in good condition?

A Yes.

MR. JAMES: That's all.

MR. HATCHER: I don't have anything further.

THE COURT: What was the value of the vehicle you saw here?

WITNESS: That would have to be an estimate or a guess. Perhaps $1500.00, or something like that.

MR. JAMES. I don't think the jury could hear him, Your Honor.

THE COURT: He said around $1500.00 when he saw it.

MR. JAMES: Mr. Hatcher, will you want Mr. Bingenheimer any more?

MR. HATCHER: No, as far as I'm concerned, he can be finally excused.

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MR. EUGENE MILLER'S TESTIMONY

JOSEPH EUGENE MILLER, CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name Joseph Eugene Miller?

A Yes, sir.

Q 2 Where do you live, Mr. Miller?

A Bowling Green, Kentucky.

Q 3 Are you the son of Alton Miller?

A Yes, sir.

Q 4 Has your father recently been injured in an automobile accident?

A Yes, he has.

Q 5 Is he able to be here in Court?

A No, sir.

Q 6 Is he in the hospital now?

A He's in intensive care.

Q 7 Mr. Miller, have you been associated with your father in the trucking rental business in Bowling Green, Kentucky?

A Yes, sir.

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Q 8 Are you or not familiar with a 1965 Chevrolet with a moving van, or furniture van, type of body on it that was rented from your company in November or December of 1970?

A Yes, sir.

Q 9 I believe that rental was to a James H. Steel, was it not?

A Yes, sir.

Q 10 Did you have any part in this rental?

A No, sir, I didn't.

Q 11 Now, was the truck returned to the company in accordance with the rental provisions?

A No, sir, it wasn't.

Q 12 And when rented, were there any contents in the body of the vehicle?

A They rented a dolly and twelve pads with it.

Q 13 Have you seen the truck since it was rented?

A We got the chassis and the cab back.

Q 14 The chassis and the cab?

A Yes, sir.

Q 15 And was or not the body gone?

A The body was gone, yes, sir.

Q 16 Have you seen any part of that body?

A No, I have not.

Q 17 Now, at the time it was rented, what was the fair and reasonable market value of the truck and the moving van

body?

A Just off-hand, I would say close to $2400.00—maybe more than that with that kind of body on it.

Q 18 Will you speak up louder so the jury can hear you?

A I say I don't really know the exact—what it would be worth—but with that type of van body on it, it would be

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close to or more than $2400.00, somewhere along there.

Q 19 It would be well over a hundred dollars, wouldn't it?

A Oh, yes, sir.

Q 20 Now, Mr. Miller, when you got the chassis and the cab, was that your truck? You identified it as being your truck?

A Yes, sir.

Q 21 Had it been kept and retained beyond the rental period without your permission?

A Yes, sir.

Q 22 And had anybody your permission or authority to remove the body from it or do anything at all to it?

A No, sir.

Q 23 Now, do you know what the serial number of the truck was?

A I don't have that information with me.

Q 24 I will show you a copy of the invoice for the vehicle.

(THE COMMONWEALTH ATTORNEY SHOWED A PAPER TO THE DEFENSE COUNSEL, THEN HANDED IT TO THE WITNESS.)

Now, from that copy can you tell us what the serial number was?

A The serial number is not listed on this; you'd have to have the license.

Q 25 This is an invoice at the time you bought it?

A This is the rental agreement.

Q 26 Was there any way you could identify, other than the serial number, the chassis and cab of that truck?

A The cab was the same color; you can look at the cab and tell it was the same truck.

Q 27 Well, are you or not positive that that was your truck?

A Yes, sir, it was our truck.

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Q 28 Do you have any papers with you at all pertaining to this?

A I have just the copies you have, and this is more clear.

Q 29 This was the vehicle that was purported to be rented to James Steel?

A Yes, sir.

Q 30 Was or not the chassis and cab returned to you as owners of it?

A Yes, sir.

Q 31 And have you kept and used the vehicle?

A Yes, sir.

Q 32 Is it in use now?

A Yes, sir, it is.

Q 33 And that is the same vehicle that you got here in Elizabethtown after it had been rented as we've talked about?

A Yes, sir.

MR. JAMES: That's all.

CROSS EXAMINATION BY MR. HATCHER:

Q 34 This truck—you say it was a 1965 Chevrolet?

A Yes, sir.

Q 435 And who owned that truck?

A It's the property of the Yellow Cab U-Drive-It Company.

Q 36 Well, do you own the Yellow Cab U-Drive-It Company?

A My father does.

Q 37 Your father does?

A Sir?

Q 38 I say your father owns it? Is it a corporation?

A Yes, it's a corporation.

Q 39 Are you an agent or an officer of that corporation?

A I'm an officer.

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Q 40 How long have you been an officer in it?

A About two years.

Q 41 And were you familiar with this transaction when this vehicle was rented to this fellow Steel?

A At the time it was rented, I wasn't, no, sir.

Q 42 Who was it rented it to him, your father?

A No, sir; the girl who worked in the office and my brother had rented it to him.

Q 43 Then about all you know about is is what's on that rental agreement that Mr. James showed you?

A Yes, sir.

Q 44 You wouldn't have any personal knowledge of the rental of it other than what the record shows there?

A That's right.

Q 45 And that record shows that it was rented to James H. Steel?

A Yes, sir.

MR. HATCHER: Do you have a copy of that, Mr. James?

MR. JAMES: Mr. Miller may have a better copy of it.

Q 46 Do you have a copy of it?

A Yes, sir. (WITNESS HANDED COPY TO MR. HATCHER.)

Q 47 So Mr. Steel, who rented the truck, legally obtained possession of it—that is, with the permission of the owner, did he?

A Yes, sir.

MR. HATCHER: I believe that's all.

MR. JAMES: Will you want Mr. Miller any more?

MR. HATCHER: No.

MR. JAMES: Mr. Miller, you may be excused.

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June 28, 1972

DEFENSE COUNSEL'S MOTION FOR A DIRECTED VERDICT

WHEREUPON THE COURT ANNOUNCED THAT THERE WERE MATTERS TO TAKE UP IN CHAMBERS, ADMONISHED THE JURY, AND ALLOWED THEM A RECESS. THE FOLLOWING PROCEEDINGS WERE HAD OUT OF THE HEARING OF THE JURY:

MR. HATCHER: Your Honor, the Commonwealth having introduced its proof and rested, and at the conclusion of all the proof introduced by the Commonwealth, comes the Defendant and moves the Court to direct the jury to return a verdict of not guilty because the evidence introduced by the Commonwealth, with all reasonable inferences to be drawn therefrom, is not sufficient to prove all of the elements or offenses for which the Defendant is charged and for which he is being tried; and for that reason, the Defendant is entitled to a directed verdict for acquittal at this time and moves the Court to so order same on each of the four counts of the indictment for which the Defendant is being tried.

MR. JAMES: To which motion, the Commonwealth objects, and submits that it is a jury question and that the evidence standing unexplained is sufficient for a jury to decide.

THE COURT: I feel at this time that a jury question does exist,

and for that reason I overrule the motion for a directed verdict.

MR. HATCHER: The Defendant at this time moves the Court to declare a mistrial and discharge the jury and continue the trial of this case, because by the previous ruling of the Court the Commonwealth was directed to elect which count or counts of the indictment it would try the Defendant on, having sustained Defendant's motion for a severance. Pursuant thereto, the Commonwealth did elect to try the Defendant only on Counts 1, 2, 3, and 4 of the indictment. In the course of the trial, the Commonwealth has introduced extensive evidence pertaining to the other four counts of the indictment which were not on trial, and for that reason has violated the Court's order sustaining a motion for the severance, and has materially prejudiced the Defendant by placing before the jury evidence concerning the four counts for which the Defendant is not being tried, even including evidence of the arrest of the Defendant on one of the counts that is not being tried.

MR. JAMES: To which motion the Commonwealth objects, and without any specifics other than have been stated, replies that the Commonwealth has not introduced any evidence that does not come within the scope of admitted evidence and that is not directly connected with the four counts, either in proof of those counts or in proof of a common plan, scheme, intent, motive, and knowledge. There has been no evidence of what he was arrested for and, in

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fact, the officer has testified that he arrested him and stated that there were no formal charges made, and that he was in error in saying that he had made formal charges, and he could well have been referring to any one of the four counts, and there is no evidence that he was not referring to the arrest for them. Other than that, the motion of Defendant does not allege any specific item that would be prejudicial in this proceeding.

MR. HATCHER: Well, as far as alleging specific items, the case is resplendent with evidence of burning of the truck bed which is an additional charge, and also of the tobacco at the Greensburg warehouse.

MR. JAMES: There is no evidence except as to "other tobacco" other than the Parsley, which was part of it. There is no evidence concerning the burning of the bed except as would be proof of attempt to destroy the identity of the motor vehicle, and assert the knowledge of Defendant.

THE COURT: I think the Commonwealth may prove facts to show knowledge and intent and purpose, even though the facts may at times refer to other matters for which the Defendant is charged. Of course, he is not being tried on those and the jury will not be instructed on those if it goes to the jury. And I feel at this time that the Commonwealth has confined itself as best it could and sufficiently. I do know that some matters have been brought out on cross examination, and things like that; but I feel that the Commonwealth has confined itself sufficiently, and I overrule the motion for a mistrial.

VOLUME III

June 29, 1972

MOTIONS BY DEFENSE COUNSEL FOR A DIRECTED VERDICT AND DECLARATION OF A MISTRIAL.

Defendant's Motions for Directed Verdict and Mistrial

THE FOLLOWING PROCEEDINGS WERE HAD IN CHAMBERS, OUT OF THE PRESENCE AND HEARING OF THE JURY:

MR. HATCHER: At the conclusion of all the proof in this case, comes the Defendant and moves the Court to peremptorily instruct and direct the jury to return a verdict of not guilty as to Count No. 1, and as to Count No. 2, and as to Count No. 3, and as to Count No. 4 of the indictment, because sufficient evidence to prove all of the necessary elements of the offense charged has not been introduced on behalf of the Commonwealth; and such evidence as has been introduced on behalf of the Commonwealth has been completely and successfully explained by the evidence introduced by the Defendant, and for said reason, Defendant moves for a directed verdict as to each count for which he is being charged.

MR. JAMES: The Commonwealth objects to such motion, and without reviewing the evidence in detail, states that there is a jury question on each of the four counts.

THE COURT: I think it's a jury question, and I think there is sufficient evidence for the jury to consider, and I think it should be considered by the jury; so I overrule the motion for a peremptory instruction on each of the counts.

MR. HATCHER: The Defendant moves the Court to declare a mistrial and discharge the jury and continue the case because of the introduction into evidence of four other offenses which were alleged in the indictment and which were not to be tried in the trial of the offenses alleged in the first four counts; and states in support thereof that the Commonwealth introduced evidence of the offenses alleged in Counts 5, 6, 7, and 8 of the indictment; that the Defendant by counsel has heretofore objected thereto and has moved the Court to discharge the jury for reason thereof but that the Court has overruled said motion and objections, which placed

the Defendant in the burdensome position of having to introduce evidence in rebuttal to and explanation of the evidence introduced by the Commonwealth as to each of the other four counts in the indictment which are not being tried. The Defendant was reluctant to introduce evidence in these matters, but since the Court had permitted the Commonwealth to introduce evidence, the Defendant necessarily had to follow up that evidence and introduce his evidence on the said matters. So the evidence introduced by the Commonwealth and the evidence which the Defendant was required to introduce to explain or contradict same, has placed the Defendant in jeopardy as to four other offenses which the Court has heretofore ordered to be severed and which the Commonwealth has elected to be severed from the counts in the indictment, 1, 2, 3, and 4, which the Commonwealth elected to try and which are the only counts that should have been tried at this time.

MR. JAMES: The Commonwealth objects to this motion for the same reasons and on the same basis as stated when the motion was made previously.

THE COURT: Well, I still feel that the Commonwealth has very well restricted itself to the four charges that are being tried. There was evidence of the truck bed being burned but I think that there was nothing about the charge for that; there was evidence about questions being asked at that time, but I do think that it was competent in conjunction with the receiving one of the trucks. As for the other three counts, which all concerned tobacco, I don't feel that they have been mentioned significantly, if at all. For that reason, I overrule the motion.